MALAYSIAN REPORTS

RE KONG THAI SAWMILL (MIRI) SDN. BHD.; LING BENG SUNG v. KONG THAI SAWMILL (MIRI) SDN. BHD. & ORS.

[F.C. (Gill C.J. (Malaya), Wan Suleiman F.J. and Tan Chiaw Thong J.) August 4, 1975]

[Kuching — Federal Court Civil Appeal No. 101 of 1974]

Companies — Application to court for order on the ground that powers of directors are being exercised in a manner oppressive to one of the members or in disregard of his interests — Position of directors — Misuse of company's funds. — Whether application can be made by director — Companies Act, 1965, ss. 181 (1) and 181(2).

The appellant had applied by originating summons in his capacity as a member of the first respondent company for a series of orders the gist of which was that the second and third respondents be removed from office as managing director and director respectively and a receiver and manager be appointed to conduct the company's affairs and for repayment of various sums alleged to have been disposed of wrongfully or without proper authorisation. The company was a family one in which the elder brothers were the majority shareholders. The appellant and two other younger brothers were minority shareholders. The appellant was appointed a director of the company but he took no active part in its affairs and he ceased to be a director after 1971. It was alleged that the second and third respondents had committed breaches of their powers as directors of the company and in particular complaint was made relating to (a) purchase and outfitting of a motor yacht, Berjaya Malaysia; (b) donations to political parties; (c) drawings by the second and third respondents from the company's funds. It appeared that after inquiries instituted by the appellant many of the acts of the second and third respondents were validated by resolutions of the company. The learned trial judge dismissed the application and the appellant appealed to the Federal Court.

Held, allowing the appeal: (1) there are two fundamental principles as regards the position of directors. First they are trustees of the company's money and property in the sense that they must account for all the company's money and property over which they exercise control and must refund to the company any money or property which they have improperly paid away. Secondly they are trustees of the powers entrusted to them in the sense that they must exercise their powers honestly and in the interests of the company and the shareholders and not in their own interests, failing which they may render themselves liable for their misuse of such powers;

(2) in this case the purchase by the second respondent of the yacht, *Berjaya Malaysia,* was misuse of the company's funds and the moneys which he paid out or for which he had himself reimbursed from the company's funds in respect of the donations to the Sarawak Chinese Association and S.N.A.P. were improperly paid away. The second respondent should therefore take over *Berjaya Malaysia* and pay to the company all the money spent on it and also pay the company the amount of the donations paid to the political parties;

(3) there was no authority for the substantial drawings taken by the second and third respondents and these were done in contravention of the provisions of the Companies Act, being loans to the directors of a public company;

(4) the fact that the appellant was a director of the company during the relevant period did not prevent him from taking the action, as there was no evidence to show that he had knowledge of or had taken part in any of the acts complained of;

(5) the rule in *Foss* v. *Harbottle*(7) did not preclude the appellant from taking action as the acts complained of in this case constituted a fraud in the minority of the shareholders and quite apart from the question of fraud the rule is no bar to an individual shareholder making an application to the court under section 181 of the Companies Act;

(6) in order to protect the minority shareholders in this case the court would order (i) that one of the younger brothers be appointed as director to safeguard their interests, (ii) that donations be made in future only with the prior approval of the Board of Directors, (iii) that no bank account be operated without the signatures of two directors, one of whom shall be other than the elder brothers, the majority shareholders, (iv) that no moneys be drawn by any of the Directors without the prior approval of the Board, (v) that the power delegated to the first respondent to make investments on behalf of the company be cancelled, (vi) that three clear days' notice be given in writing of any director's meetings and (vii) that the bonus for the directors in future be 2% of the nett profits and that no bonus be paid until after the passing of the company's accounts at the Annual General Meeting.

Cases referred to:-

(1) *Re R. H. Harmer Ltd.* [1958] 3 All E.R. 689; [1959] 1 W.L.R. 62.
(2) *Scottish Co-operative Wholesale Society Ltd.* v. *Meyer & Anor.* [1958] 3 All E.R. 66, 86.
(3) *Re Lands Allotment Co.* [1894] 1 Ch. 616, 631.
(4) *Guth* v. *Loft Inc.* 5 Atlantic Reporter (2nd Series) (Del.) 503, 510.
(5) *Re Denham & Co.* (1884) 25 Ch. D. 752.
(6) *Loch* v. *John Blackwood Ltd.* [1924] A.C. 783, 794.
(7) *Foss* v. *Harbottle* (1843) 67 E.R. 189.
(8) *In re Bellador Silk Ltd.* [1965] 1 All E.R. 667.
(9) *Re Coliseum Stand Car Service Ltd.* [1972] 1 M.L.J. 109.

FEDERAL COURT.

J. E. Vinelott Q.C. (*Peter Mooney* and *Joseph Tang* with him) for the appellant.

G. Darvall Q.C. (*G. Starforth Hill* and *C. T. Wong* with him) for the respondents.

Gill C.J. (Malaya): This is an appeal from the dismissal by B. T. H. Lee J. of the appellant's application by way of originating motion in which, in his capacity as a member of the first respondent company, he asked for a series of orders the gist of which was that the second and third respondents be removed from office as the managing director and director respectively of the company and a receiver and manager be appointed to conduct the business and investigate the affairs of the company, that they do pay to the company various sums of money which they had taken or paid out from the company's funds wrongfully or without proper authorisation or for unauthorised purposes, and that in the alternative the company be wound up.

As one of the grounds on which the application was opposed was that it was made by the appellant maliciously because of family disputes prior to the formation of the company, it will be useful to refer briefly to such disputes as a historical background of these proceedings.

The parties to the proceedings are the sons of the late Ling Chui Ming who died in 1955 leaving six sons whose names in order of seniority are Ling Beng Siew (the second respondent), Beng Tuang, Beng Siong (the third respondent), Beng Sung (the appellant), Beng Hui and Beng King. During his lifetime the father made each of his sons a partner in the two family partnership firms known as Kong Thai (M.K.) Sawmill, Sibu and Ban Hin Sawmill Mukah. After his death letters of administration of his estate were granted to Beng Siew and Beng Siong who also carried on the family partnership businesses.

The first family dispute arose about the year 1958 when the younger brothers asked Beng Siew for ac-

counts of the administration of their father's estate and were met with the answer that the accounts had been destroyed in accordance with the father's business practice. This dispute was settled without resort to the court.

The second dispute arose in 1962 when the three younger brothers asked for accounts of the partnership business and were told that they had been lost in a flood. As a result of this dispute the three elder brothers brought an action against the three younger brothers in the High Court at Sibu for a dissolution of the partnerships and distribution of the assets. The action was defended but was ultimately disposed of by the court making an order in the terms of a settlement as proposed by the parties through their solicitors.

The result of the settlement was that the elder brothers purchased the younger brothers' interest in Kong Thai (M.K.) Sawmill Sibu by transferring to the younger brothers their interests in Ban Hin Sawmill Mukah as part of the purchase price and paying the balance of the purchase price in cash amounting to over two million dollars. Thus Ban Hin Sawmill Mukah became the property of the three younger brothers and was incorporated in December 1962 as Mukah Sawmills (1962) Sendirian Berhad. Kong Thai (M.K.) Sawmill was eventually incorporated under the name of Kong Thai (1963) Sendirian Berhad. This company was entirely different from Kong Thai Sawmills (Miri) Sendirian Berhad, the first respondent company, with which we are concerned in these proceedings.

Kong Thai Sawmills (Miri) Sendirian Berhad (hereinafter referred to as "the company" or "K.T.S.") was formed by the three elder brothers Beng Siew, Beng Tuang and Beng Siong, each of whom was named a director in the Articles of Association of the company. The company was incorporated in Sarawak on June 29, 1964 with an authorised capital of three million dollars divided into 30,000 shares of $100 each. At the first formal meeting of the company held on January 16, 1965, the first 10,000 shares representing a capital of one million dollars were issued. Beng Siew, Beng Tuang and Beng Siong were allotted 7,150, 1,000 and 500 shares respectively. In 1966, a further 3,600 shares were issued so as to increase the paid-up capital of the company to $1,360,000.

On April 1, 1965 a licence was issued to the company to extract timber from a forest area in the Miri District of Sarawak for a period of ten years. Like all timber companies, K.T.S. faced financial difficulties in the early stages of its development and had to take a loan for a large sum of money from Kong Ming Bank belonging to the three younger brothers on the security of bills of sale over its working equipment. In 1966, 1,000 shares in K.T.S. were issued to Mukah Sawmills, the younger brothers' company. Those shares were subsequently transferred to the three younger brothers. Beng Sung and Beng Hui took 330 shares each and Beng King 340. Those were the shares which the younger brothers held in K.T.S. at the time of commencement of these proceedings when Beng Siew, Beng Tuang and Beng Siong had 7,582, 1,060 and 1,060 shares respectively.

Beng Siew was elected as chairman and managing director of the company with effect from January 1, 1965 at a directors' meeting held on January 20, 1965 and he has occupied that position ever since. Beng Tuang and Beng Siong have been directors of the company since its formation. Beng Sung was made a director on February 2, 1967, but it is common ground that he took no active part in the affairs of K.T.S. Directors' meetings which were held from time to time but there is nothing to indicate that notices of meeting or agenda were distributed. There is also nothing to indicate that notices of meetings or agenda or copies of the accounts were sent to shareholders prior to general meetings. Beng Sung attended one General Meeting, but he never attended any meetings of the directors.

Under the powers given to them by Article 76 of the Articles of Association of the company, the directors by a resolution passed at a meeting held on December 27, 1967 authorised the managing director Datuk Ling Beng Siew "to purchase tractors, logging trucks, machines and any other equipment necessary for the operation of the company." By a further resolution at the same meeting they delegated to the managing director the power to make such investments as he thought fit and proper on behalf of the board of directors and for that purpose to make use of the company's seal.

On the authority of the powers delegated to him, Beng Siew in the years 1968 to 1970 advanced large sums of money from the company's funds to other companies in which K.T.S. ultimately acquired considerable shares. Most of the investments in such other companies were acquired in the same manner. During the formative and exploratory period, expenses relating to a project were debited to an account with some suitable name and shown as advances in the account. Later, when it was decided to proceed with the project, shares were issued in consideration for the amounts advanced. Alternatively, if it was decided that the project was not viable, the amounts advanced were written off.

These other companies with which we are concerned in this appeal are P.T. Kalimantan Sari, United Singapore Lumber (Pte.) Limited, Kong Thai Lumber Sendirian Berhad and Sabah Agency Sendirian Berhad. Kong Thai Lumber was formed to extract timber for Chalfont Investments Limited, a Hong Kong company in which Beng Siew and Beng Siong had shares. Similarly Sabah Agency was formed to extract timber for Glendale Investments Limited, another Hong Kong company in which also Beng Siew and Beng Siong had shares.

In January 1968 Beng Siew bought the land, building, fittings and business of Aurora Hotel and Aurora Chambers in Kuching for two million dollars. In February 1969 he acquired for K.T.S. a major shareholding in Malaysia Daily News Sendirian Berhad which published a Chinese language newspaper called the *Malaysia Daily News*. In January 1968 he purchased an ocean-going vessel called Berjaya Malaysia which was reconstructed by the company at a considerable cost. In 1969 on the authority of either Beng Siew or Beng Siong a sum of money was ad-

vanced from the company's funds to Encik Harun Ariffin who was then the Federal Secretary in Kuching. I mention this because this loan to Harun was raised as an issue in the proceedings and is the subject matter of this appeal.

During the initial stages the company was developing its concession when its future was uncertain. From 1966 onwards the concession proved to be very profitable. The company started making large profits and a lot of money was being distributed as dividends. During the years 1966 to 1970 the gross profits of the company before tax amounted to $24,660,000 on which tax liability was $15,895,000, so that the net profits amounted to $8,765,000. The net amount paid out to shareholders after deduction of income tax was $2,298,400. Remuneration and bonuses together with travelling and entertainment expenses amounted to $2,224,000. Donations during the same period totalled $2,018,000. The net position of the company, however, was that it ran short of working capital and had to take a big loan from a bank the repayment of which was guaranteed by Beng Siew personally.

During the relevant period both Beng Siew and Beng Siong were politically active. For some years Beng Siew had been Chairman or President of the Sarawak Chinese Association and was previously the nominated Member of Parliament. Beng Siong became a Minister of the Sarawak Government in 1966. Perhaps this accounts for the fact that very large sums of money were donated to political parties during the said period on the authority of Beng Siew or Beng Siong.

In 1970 the applicant-appellant Beng Sung saw the accounts of the company which showed that large sums had been given away in donations during the financial year ending on September 30, 1969. This made him write a letter to the secretary of K.T.S. on April 27, 1970 to ask for particulars of donations, debtors, investments, travelling expenses and details of the total money spent on entertainment. On receiving no reply to his letter he wrote again on May 14, 1970. There was still no answer.

On September 29, 1970, he applied to the court under section 167(5) of the Companies Act 1965 for an order that the accounting and other records of the company be open to inspection by an approved company auditor acting on his behalf. In his affidavit in support of the application, he stated that he had for some time been and still was concerned about the manner in which the affairs of the company were being conducted by Beng Siew and, in particular, that he was concerned about the application of the liquid assets and revenue of the company. The application was not opposed by the respondents, and on November 18, 1970 the court made an order appointing Mr. Andrew Peattie, a chartered accountant and an approved company auditor, to inspect the accounting and other records of the company on behalf of the applicant.

At the next general meeting of the company held on February 16, 1971 Beng Sung retired as director and was not re-elected. He has not been a director of the company since that date.

In pursuance of the order of court dated November 18, 1970, Peattie examined the books and records of the company and put up two separate reports containing what he saw in the books of the company. The contents of his reports were summarised and embodied in an affidavit which he affirmed on August 10, 1971. In September 1971 he conducted a further examination of the company's books, in respect of which he put up a third report but affirmed no affidavit.

The originating motion from the dismissal of which this appeal has been brought was taken out by the applicant in the High Court in Borneo at Sibu on September 1, 1971. It was supported by Peattie's affidavit of August 10, 1971 which was reaffirmed on November 27, 1971 for the purpose of these proceedings. The originating motion was also supported by the affidavit of the applicant affirmed on February 12, 1972. The contents of that affidavit were largely hearsay in that they related to what the applicant had gathered from Peattie's reports. All he could do was to draw attention to the serious nature of the facts revealed in Peattie's report. Beng Siew filed two affidavits in the proceedings, the first affirmed on September 30, 1971 and the second on March 14, 1972. There were affidavits filed in relation to donations to political parties and the loan to Harun.

At the hearing of the motion the deponents to the affidavits were cross-examined and re-examined at great length. A large body of evidence was recorded and lengthy written submissions were made by counsel on behalf of the parties to the proceedings. It would seem clear that the case for the applicant rested largely on the affidavit of Peattie, and to a lesser degree on the affidavit of the applicant, as well as on the evidence which they gave in court. All that evidence had to be considered in the light of what was contained in Beng Siew's affidavits and the evidence which he gave in court.

In his very long written submissions on the evidence of Peattie, counsel for the respondents emphasised again and again the fact that on his own admission Peattie had made statements in his affidavit, some of which were false, others misleading and the rest made recklessly and carelessly without sufficient inquiry. In the result it was submitted that Peattie was an unsatisfactory witness, so that his evidence should be rejected except where it was corroborated by documentary records. It was on the basis of these submissions that the learned judge stated in his judgment that the course adopted by Peattie was unjustified in point of law and in fact, as it was assuredly repellent to the sense of professional decency.

With great respect to the learned judge, all this castigation of Mr. Peattie was not justifiable, bearing in mind that some of the findings of fact which the learned judge made were based on the candid admissions made by Peattie himself. Taking the evidence of Mr. Peattie as a whole, it would seem abundantly clear that there was no attempt on his part to mislead the court. As was submitted by counsel for the applicant before the learned judge, every material fact which was set out in his affidavit and on which he gave evidence in court was proved by exhibits from the res-

pondent's own records which were produced in court. On all matters of substance the evidence of Peattie remained unchallenged and indeed could not possibly have been challenged because it consisted of the company's own records.

Peattie had a difficult duty to perform under the court order. He had to go through the voluminous records of the company from January 1965 for a period of not less than 6 years in order to prepare his reports. As submitted by counsel for the applicant in the court below, it was a monumental task and involved the perusal of thousands of entries in the accounts and the copying of a great many of them. It involved extracting figures, making very many calculations, tracing figures through different accounts, analysing them and finally preparing a summary. If there were slight errors through an oversight this was only to be expected.

Why Peattie's affidavit contained some untruths was obvious. He affirmed the affidavit in August 1971 in which he stated with reference to several items that he had not received certain information. By the time he reaffirmed his affidavit in November 1971 he had received that information, but he failed to correct his affidavit or file a further affidavit. Indeed what he had seen in the interval made no material difference to his evidence on the basic facts. When giving evidence in court he admitted the falsity of such statements. In these circumstances, a submission by counsel for the respondents that Peattie had made a deliberate misrepresentation of facts in order to deceive the court was, to my mind, with all deference to counsel, nothing short of a red herring.

It is to be observed that the attack on Peattie's credibility was launched solely on the basis of the untruths in his affidavit, but the case was not tried on affidavits. The application was not an *ex parte* motion. It was clear right from the beginning that the application was going to be contested and that the parties would have to give evidence in court. In the final analysis the motion had to be decided not so much on the affidavit evidence but the *viva voce* evidence of the parties and witnesses in court.

To reiterate what I have already said, the material facts stated in Peattie's affidavit were proved not only by his evidence in court but independently by the production of exhibits containing those facts. I can find nothing in the evidence of Peattie taken as a whole that he was a biased witness. He was entitled to express his professional opinion on the state of the accounts, but the court was not bound by such opinions. I must repeat that I can find nothing in the evidence of Peattie as a whole that he was not a witness of truth. Indeed, the learned judge never said so in so many words. The harsh words which he used about Peattie were in relation to his affidavit alone. As I have already said, some of the judge's findings of fact were based on the evidence of Peattie himself.

As the learned judge has stated at the beginning of his judgment, the question in these proceedings to which an answer had to be found lay within a small compass. That question was whether the applicant's motion was rightly made under section 181(1) of the Companies Act 1965, and whether the court on the evidence before it and in all the circumstances of the case could make such orders as it thought fit, including the orders specified in section 182(2) of the Act.

Section 181(1) of the Companies Act reads as follows:

"Any member ... of a company ... may apply to the court for an order under this section on the ground — (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members ... including himself or in disregard of his or their interests as members, shareholders ... of the company; or (b) that some act of the company has been done or is threatened or that some resolution of the members ... or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members ... (including himself)."

Section 181(2) of the Act states as follows: —

"If on such application the court is of the opinion that either of such grounds is established the court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the Order may —

(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in future;

(c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;

(d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(e) provide that the company be wound up."

It is to be observed that the jurisdiction of the court under section 181(1)(a) of the Act arises if it is shown that the powers of the directors are being exercised in a manner oppressive to one or more of the members or in disregard of their interests. The word "oppressive" was defined in *re R.H. Harmer Ltd.*[1] to mean "burdensome, harsh and wrongful". In *Scottish Co-operative Wholesale Society Ltd.* v. *Meyer & Anor.*[2] Lord Keith of Avonholm said:

"Oppression under section 210 may take various forms. It suggests, to my mind, as I said in *Elder* v. *Elder & Watson* (1952 S.C. 49), a lack of probity and fair dealing in the affairs of a company to the prejudice of some portion of its members. The section introduces a wide power to the court to deal with such a situation in an equitable manner which it did not have in the case of a company prior to the passing of the Act of 1948. The court has here acted, in my opinion, within the powers conferred on it."

Section 181 of our Companies Act is derived from but is wider in scope than section 210 of the English Act 1948 and section 186 of the Australian Act.

The originating motion taken out by the applicant contained 60 prayers. The basis of each of those prayers was that Beng Siew and Beng Siong had over a long period committed breaches of their powers and duties as directors of the company. It will therefore be necessary to consider what the powers and duties of directors of a company are. In *Re Lands Allotment Co.*[3] Lindley L.J. said:

"Although directors are not properly speaking trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is actually under their control; and ever since joint companies were invented directors have been liable to make good moneys which they have misapplied upon the same footing as if they were trustees. ..."

In the same case Kay L.J. said at page 638:

"Now, case after case has been decided that directors of trading companies are not for all purposes trustees or in the position of trustees, or quasi trustees, or to be treated as trustees in every sense; but if they deal with the funds of a company, although those funds are not absolutely vested in them, but funds which are under their control, and deal with those funds in a manner which is beyond their powers, then as to that dealing they are treated as having committed a breach of trust."

In the American case of *Guth* v. *Loft Inc.*,[4] which was cited by counsel for the applicant in the court below and to us in this court, Layton C.J., delivering the opinion of the court, said:

"Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. While technically not trustees, they stand in a fiduciary relation to the corporation and its stockholders. A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers. The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest. . . ."

The main complaints which are contained in those prayers in the originating motion relate to the following matters: —

(1) Loan to Encik Harun Ariffin;
(2) Remuneration (salary, fees and bonus) paid to Beng Siew;
(3) Travelling and entertainment expenses;
(4) Advances to and investments in joint ventures;
(5) Investment in the Malaysia Daily News Sendirian Berhad;
(6) Purchase of the Aurora Hotel;
(7) Purchase and outfitting of the motor yacht Berjaya Malaysia;
(8) Donations to political parties;
(9) Drawings by Beng Siew and Beng Siong from the company's funds.

The complaints were based on the allegations that the resources and facilities of K.T.S. were used by Beng Siew and Beng Siong as if they had responsibility to no one but themselves. For the purpose of this appeal each of those complaints calls for a separate consideration.

1. *Loan to Encik (later Datuk) Harun Ariffin*

One of the prayers in the originating motion was that Beng Siew do pay to K.T.S. the sum of $13,000 together with interest, being the sum advanced by him or with his authority from K.T.S. funds to Encik Harun Ariffin who held the high position of Federal Secretary in Sarawak. The prayer was based on Harun's account with the company which showed that a sum of $10,000 was paid to him on March 3, 1969 and a further sum of $3,000 on October 7, 1969. Harun admitted the loan of $10,000 but denied that he had the further loan of $3,000 in respect of which he was alleged to have signed a receipt dated October 3, 1969.

Apart from the debit of $10,000 and $3,000 in his account, there was a debit note of $2,526.60 made on September 30, 1971 and a further debit note of $654.74 made on April 28, 1972 presumably on account of interest. On the credit side of the account were 10 entries in respect of cash payments of $500 each made between August 28, 1971 and April 28, 1972. Thus the amount due from Harun as shown in the account on April 28, 1972 was $11,181.42.

By his letter dated May 1, 1972 Harun sent a cheque for $12,925 in respect of the loan of $10,000 and interest thereon at 6½%. On May 12, 1972 K.T.S. wrote to Datuk Harun to say that on checking his account the amount due from him was found to be $11,182.42 details of which were shown in their statement which had been forwarded to him recently, and that they were enclosing therewith their cheque for $1,743.58 being refund of overpayment. On May 15, 1972 Harun wrote to K.T.S. stating that he was not aware of the second loan of $3,000 and the payments which had been debited (should read credited) to his account, and asking for clarification. On May 18, K.T.S. replied to say that, according to their records, payment in respect of the loan of $3,000 made to him by their company was received by Datuk Ling Beng Siong on October 7, 1969 on his behalf and that the money was passed on to him with his acknowledgment on October 10, 1969, and that they were enclosing for his information photostat copies of their payment voucher with his written acknowledgment of the receipt of $3,000. This photostat copy of the voucher which was produced in evidence does not bear Harun's signature.

Harun had signed a loan agreement in respect of the $10,000 received by him in March 1969. The granting of the loan was approved by the board at a meeting held on June 10, 1970, but there was no mention made at that meeting of the alleged further loan of $3,000.

Harun filed two affidavits in these proceedings. In his first affidavit he stated that he had no recollection of the circumstances in which the alleged receipt for $3,000 was issued and denied that he had ever received any further loan of $3,000, either on October 3, 1969, being the date of the purported receipt, or on October 7, 1969 as stated in the statement of account. He also gave evidence in court. When he was shown a receipt for $3,000 bearing what purported to be his signature, he said that it could be his signature but he was not sure. He denied the suggestion that he went to the office of Beng Siong where Beng Siong helped him with $3,000 in cash for which he signed a receipt. He said he did not ask for the money and did not receive the $3,000. When further questioned, he agreed that the receipt appeared to be signed by him. He later said he could not think how the receipt for $3,000 had come into existence but that the signature on the receipt looked like his signature. He was shown various receipts for $500; he denied he had made any payments or received any receipts. In re-examination he said he could not remember signing the receipt and that it was not signed by him.

Evidence was given by a hand-writing expert from London named Julius Grant, who had earlier filed an

affidavit, that on comparison of other signatures of Datuk Harun with his alleged signature on the receipt there was a high probability that the signature on the receipt was that of Datuk Harun, but that he could not exclude the possibility of a clever forgery.

The learned judge says this in his judgment regarding this loan of $3,000:

"Having examined the receipt (Ex. DTS. 47) myself I find as a fact that on the evidence the signature of Harun on the receipt for $3,000 is genuine, that the payment was in fact made to him, that it has since been repaid on his own admission and has been overpaid and that the company has not lost any money in the process. There is therefore nothing further to be done in this matter."

With respect to the learned judge, there was no admission by Harun of any repayment in respect of the loan of $3,000. It may not be possible to quarrel with the learned judge's finding of fact that the signature of Harun on the receipt is genuine, but, with respect, there is no evidence whatsoever to support his further finding that the sum of $3,000 had in fact been paid to Harun. The evidence was that the money was paid to Beng Siong to be paid to Harun. There was no evidence that Beng Siong in fact paid the money over. The letter informing Harun that the money had been paid to Beng Siong to be paid over to him was no evidence of such payment. The one person who could prove payment was Beng Siong. He was a party to the proceedings and presumably was in court. Why did he not give evidence if he had nothing to hide? Why was it necessary to incur all that expenditure to bring an expert all the way from London to prove that the signature on the receipt was that of Harun when Beng Siong could easily have gone into the witness box to say that he had in fact paid the money over? His evidence to that effect together with the learned judge's finding that the signature of Harun on the receipt was genuine would have clinched the matter.

As submitted by counsel for the applicant in the court below, it was difficult to think of any motive which Datuk Harun might have had for denying the additional loan of $3,000, especially when it was said to have been repaid and there was no question of his being required to make any further payment. It was further submitted that it was even more difficult to conceive why Harun should have denied making those monthly payments of $500 if he actually made them. Those payments shown in the account are alleged to have been made in cash. There was no evidence produced as to how Harun sent the cash from Kuala Lumpur where he then was. It is extremely unlikely that he made personal visits from Kuala Lumpur in order to make the payments in Sarawak. If the payments were made by cheque or money order, which were cashed, it should have been possible to produce evidence to that effect. The only evidence produced with regard to those instalment payments was the mere production of the company's statement of accounts.

I must say with all respect to the learned judge that there was no evidence before him to connect Datuk Harun with the alleged monthly payments of $500. I agree with him that the company has not lost any money in the process, so that there is nothing more to be done in the matter. But there was nothing wrong about the applicant raising this issue. As submitted by counsel for the applicant, it was wrong for Beng Siew or Beng Siong on their own initiative and without approval of the board to have taken the company's money in order to make a loan to a public servant.

In the final analysis nothing very much turned on this loan to Harun. Indeed it is a matter of regret that it should have been raised and that there should have been such fight over it. Nevertheless, if Harun's story about his never having received the additional loan of $3,000 is true, and, as I have already said, there is no evidence to contradict it, then it is not possible to resist the conclusion that Harun's account with the company was not quite correct.

2 *Remuneration (Salary and Bonus) paid to Beng Siew*

Article 68 of the Articles of Association of the company provides that the remuneration of the directors other than the managing director shall be such as may be decided in general meeting. Article 74 provides that the directors may appoint the managing director upon such terms as they think fit. At the meeting held on January 20, 1965 at which Beng Siew was appointed chairman and managing director, his salary was fixed at $1,500 per month. At the same meeting it was resolved that the directors' fee would be $500 per person annually and that the directors' bonus would be 5%, 4% for the managing director and 1% for the other directors. At the second annual general meeting it was resolved pursuant to the earlier resolution to pay $500 to every director holding office in 1965 and $600 per annum for each director holding office in 1966. No mention is made of the directors' fee in the minutes of the subsequent meetings until the 7th Annual General Meeting held on February 16, 1971, when "it was resolved to pay annually directors' fee of $600 per person and directors' bonus of 5% of which 4% to the managing director and 1% to the other directors."

The resolutions regarding bonus to be paid to directors merely mentioned 5% but did not say of what. It is not clear whether the bonus was calculated on the profit after or before taking into account preliminary expenses, taxation, adjustment of depreciation on disposals and profits and losses on disposals of fixed assets. In 1967/68 the loss on Aurora Hotel was deducted from the profits before calculating the bonus. In 1968/69 and 1969/70 the loss on Aurora Hotel was not deducted before calculating the bonus, nor was the loss on the subsidiary company, Malaysia Daily News Sendirian Berhad. This would appear to be the only criticism which could be made about the total amount of bonus paid to the directors.

Up to the year ended September 30, 1967 Beng Siew took 4/5 of the bonus pool and the other directors shared the remaining 1/5. In the year ended September 30, 1968 and in subsequent years he successfully claimed a share of the remaining one-fifth along with the other directors. Beng Siew's account with the company kept in the name of Ling Beng Siew & Co. was normally in debit, and before the books were closed a sum representing his share of the estimated

bonus was credited to the account to help reduce the balance at the year end. The other directors were generally paid their share of the bonus pool in February or March when the audited figures became available.

During the period September 30, 1966 to September 30, 1970 Beng Siew received by way of salary, fees and bonus a sum of $1,135,326, apart from the remuneration which he received from companies associated with K.T.S. There can be no dispute about the salary which was paid to Beng Siew, but there can be no doubt that his fees and bonus were huge when compared to the net amount paid to the shareholders during the same period. It was said that where bonuses are computed according to an agreed formulae and the liability to pay them is a contractual obligation, it is not unusual to credit an amount to the accounts of the persons concerned at the date of closing of books of account. It was further said that it was not unusual for persons to be allowed to draw moneys in anticipation of bonus.

Normally it would be wrong for the court to interfere with directors' fees and bonus as fixed by them at the appropriate meetings, but I think it is open to the court, when the amount so fixed is excessive and out of proportion to a director's shareholding, to say that that amounts to oppression of other shareholders. In other words, a majority shareholder must not take undue advantage of his voting powers to fix too high a bonus for himself as managing director. I do not think it is possible for this court to say that Beng Siew should be called upon to pay back to the company a part of the enormous sums which he received, but I have very little hesitation in saying that the amounts paid to him were so large that they were paid in complete disregard of the interests of the other shareholders.

3. *Travelling and Entertainment expenses*

During the period September 30, 1966 to September 30, 1970 the total amount paid out from K.T.S. funds for entertainment and travelling was $840,396. In the course of his travelling Beng Siew took with him his family, particularly his son, to expensive hotels and indulged in expensive entertainment. Travelling expenses included a daily allowance of $60 which was apparently paid to Beng Siew over and above his hotel expenses and meals etc., the only explanation offered for this daily allowance being that it was required to pay taxi fares etc. It was therefore not surprising that a substantial portion of the entertainment and travelling expenses were disallowed by the Income Tax Authorities.

The order which the applicant sought in relation to travelling and entertainment expenses was that Beng Siew should pay back to the company such sums as were disallowed by the Income Tax Authorities. Counsel for the respondents submitted in the court below that a company may and frequently does incur expenditure perfectly properly in the course of its business all or part of which may subsequently be disallowed for tax purposes. He went on to submit that in the absence of any other grounds on which these particular items were included by way of complaint the court should disregard them. The learned judge accepted those submissions and held that the amount to be allowed for entertainment and travelling expenses was a matter for the directors, that those expenses were properly incurred and that there was no ground on which he could make the order asked for.

It is true that directors must decide how much to spend on entertainment and travelling, but where the amount spent is so patently excessive or inordinately high, a shareholder may justifiably apply to the court to have the director removed. The question, however, is what can be done with directors who are controlling shareholders. Counsel for the appellant submitted to us that the proper order for the court in such a case would be a winding up order. There would appear to be some force in that argument because, although in general it is for the directors to decide how much to spend, yet the court may say in a proper case that it will interfere on behalf of a minority shareholder and may in the exercise of its discretion make such order as it deems fit under section 181 of the Companies Act.

4. *Advances to and Investments in Joint Ventures*

(i) P.T. Kalimantan Sari and United Singapore Lumber (Pte.) Ltd.

Kalimantan Sari, an Indonesian company with a timber concession in Pontianak, was apparently incorporated during 1968. K.T.S. largely financed the setting up of the operations of Kalimantan Sari. In 1967/68 it contributed $207,394.95 cts. By 1968/69 it had contributed $758,038.49 cts. A further sum of $463,724 was advanced to it by K.T.S. in the year 1969/70. Nothwithstanding the advancement of such large sums to Kalimantan Sari, for a substantial time K.T.S. had no shareholding in that company. At a meeting of the board of directors of K.T.S. held on June 10, 1970, it was resolved that the advance of $952,841.38 cts made to Kalimantan Sari up to April 30, 1970 be approved. The directors also resolved to approve the investment of $1,800,000 in Kalimantan Sari, representing 48% of the total issued capital of the company. It was also resolved that payment of capital to Kalimantan Sari be made by way of offsetting against the advances made by K.T.S. Thus K.T.S. did not have a shareholding in Kalimantan Sari until after June 10, 1970.

United Singapore Lumber (Pte.) Ltd. was incorporated in Singapore on March 25, 1969 with an authorised capital of S$3,000,000 divided into shares of 1.5 million "A" Ordinary and 1.5 million "B" Ordinary shares of $1 each. The capital for this company was provided by K.T.S. and the Borneo Company (Inchcape Group) jointly. As on December 31, 1970 the issued share capital was 2 "A" Ordinary shares of $1 each fully paid held one each by Beng Siew and Kenneth Gould who were the first directors of the company. Beng Siew was said to have held the share in trust for K.T.S. and Kenneth Gould in trust for the Borneo Company. Kenneth Gould retired on July 5, 1971 and was replaced by John Norman Hacking. K.T.S. resolved to take up 150,000 shares of the company, which were said to

represent 50% of the shareholding, at the meeting of the directors held on June 10, 1970. Subsequently during the course of these proceedings 48% of such shares were transferred to K.T.S. and 2% to Beng Siew which he said he was holding in trust for some employees of K.T.S. and in respect of which he later executed a trust deed.

Kalimantan Sari sold substantially all of its timber won from the concession to United Singapore Lumber. The business of United Singapore Lumber was almost wholly, if not solely, the resale of timber supplied to it by Kalimantan Sari and other companies. In the earlier years of its operations Kalimantan Sari either made no profits or made very small profits compared to the profits made by United Singapore Lumber on the sale by it of the timber supplied by Kalimantan Sari. After the applicant had started making inquiries into the affairs of K.T.S., a change was made so that United Singapore Lumber purported to operate on a commission basis rather than by resale. The result was that in the year ended December 31, 1971 Kalimantan Sari made a profit for the first time.

It was submitted on behalf of the applicant that Kalimantan Sari was not intended to and in fact did not make a profit, whereas United Singapore Lumber was intended to and did make a profit. This was achieved by United Singapore Lumber purchasing logs from Kalimantan Sari at less than their market value and selling them at their true value. This was denied by the respondents. On this question the learned judge accepted the written submissions made by counsel for the respondents and arrived at the conclusion that there did not seem to be any evidence to support the applicant's allegation.

In view of the fact that all the shares which Beng Siew held in United Singapore Lumber have been transferred to K.T.S. with the exception of some shares in respect of which he has executed a trust deed, and the fact that no dividends were received by him, it would be idle to speculate on what would have happened if the applicant had not started making inquiries and subsequently brought these proceedings. But it would be wrong to say that the applicant's allegations in this regard were ill-founded and actuated by malice. In my judgment there cannot be the slightest doubt, in the light of all the evidence produced, that it was as a result of the initiation of these proceedings that the matters were eventually put right.

(ii) (a) Kong Thai Lumber Sendirian Berhad (Chalfont Investments Ltd.)

(b) Sabah Agency Berhad (Glendale Investments Ltd.)

At the time of commencement of these proceedings Beng Siew and Beng Siong held 20,000 and 17,500 shares respectively out of the total 100,000 subscribed shares in Chalfont Investments Ltd., a company incorporated in Hong Kong on September 5, 1968. The shares to Beng Siew and Beng Siong were allotted on December 31, 1969. The only business of Chalfont is and has been the exploitation of various concessions in Indonesia by an agreement with the Indonesian concessionaires. For the extraction of timber Chalfont entered into an agreement with Kong Thai Lumber Sendirian Berhad (hereinafter referred to as "K.T. Lumber"), a company incorporated in Sabah on December 28, 1968. The only business carried on by K.T. Lumber has been to extract timber for Chalfont from those areas in which Chalfont had the right to exploit the concessions. Between 1968 and 1970 K.T.S. lent to K.T. Lumber to help in its operations a total sum of $678,936.91 cts. The purchase price of the shares eventually issued to K.T.S. in K.T. Lumber was satisfied by the reduction of the amount owed by K.T. Lumber to K.T.S. From the time of its incorporation until June 15, 1970 the only issued shares in the capital of K.T. Lumber were the subscriber shares. On that date 8,998 shares were issued, 2,248 to Beng Siew and 3,375 each to K.T.S. and the Borneo Company (Singapore) Sendirian Berhad.

Beng Siew and Beng Siong also held 13,500 and 9,000 shares respectively out of the 60,000 subscribed shares in Glendale Investments Ltd., yet another company incorporated in Hong Kong on November 15, 1968. The shares of Beng Siew and Beng Siong in this company were also allotted on December 31, 1969. The only business of Glendale also is and has been the exploitation of forest concessions in Indonesia by an agreement with the Indonesian concessionaires. For the extraction of timber Glendale entered into an agreement with Sabah Agency Sendirian Berhad, a company incorporated in Sabah on December 31, 1968. The only business carried on by Sabah Agency has also been to extract timber from those areas in which Glendale has had the right to exploit the concessions. Between 1968 and 1970 K.T.S. lent to Sabah Agency a total sum of $1,674,738.10 cts to help in its operations. The purchase price of the shares eventually issued to K.T.S. in Sabah Agency was satisfied by the reduction of the amount owed by Sabah Agency to K.T.S. From its incorporation in 1968 until April 15, 1970 the only issued shares in the capital of Sabah Agency were the subscriber shares. On that date 8,997 shares were issued, 1,349 to Beng Siew, 2,700 each to K.T.S. and the Borneo Company (Singapore) Sendirian Berhad, and the rest to three other persons.

The agreements pursuant to which K.T. Lumber carried out work for Chalfont and Sabah Agency carried out work for Glendale were entered into on behalf of the Sabah companies by Beng Siew as their director. It is common ground that Beng Siew entered into these contracts without the approval of the board of directors of K.T.S. and did not disclose to the directors of K.T.S. his interest in those contracts by reason of his shareholding in the Hong Kong companies. It was submitted for the applicant that those agreements by Beng Siew were so drawn up as to make it inevitable that the operations of K.T. Lumber and Sabah Agency would be unprofitable. This was because of the fixed price for the timber over a long period of years.

For the respondents it was contended that the Hong Kong companies were required under the contracts to provide all heavy equipment for the extraction of timber so that the risk in regard to the capital investment in the equipment rested entirely with them. The learned judge took the view that as the respon-

dents had made available all the accounts of the Hong Kong companies as asked for in the originating motion, there was nothing more to be done in the matter. He further found that apart from speculative allegations on the part of the applicant there was no evidence that the funds of K.T.S. were used for the purpose of financing those two Hong Kong companies.

It is not in dispute that whereas the Hong Kong companies were making profits, or at any rate not suffering great losses, right from the beginning, the Sabah companies suffered losses in the initial stages of their operations. I think it is also not seriously in dispute that any timber company is not likely to make profits within the first two or three years of its operations. The original agreements into which Beng Siew entered on behalf of the Sabah companies with the Hong Kong companies may be said to have been more advantageous to the Hong Kong companies but they were amended, so that matters have now been put right. In my view it is reasonable to assume that they may not have been put right but for these proceedings. The complaints in this regard by the applicant were therefore not ill-founded or made maliciously to discredit Beng Siew or to disparage him and his associate brothers as alleged in Beng Siew's first affidavit on September 30, 1971.

The question which arises out of those contracts entered into on behalf of the Sabah companies with the Hong Kong companies by Beng Siew without the approval of and without the disclosure of his interest in those contracts to the directors of K.T.S. is whether he is liable to account to K.T.S. for the profits which he made in the Hong Kong companies.

It was submitted at the hearing of the appeal before us by learned counsel for the appellant that he is so liable. The arguments in support of that submission proceeded on these lines. A director is a trustee of the funds of the company and of his power over the company's affairs. He must use those powers solely for the benefit of the company. He is absolutely prohibited from entering into a transaction in which he is interested, although the company's articles may permit the other directors to enter into a contract in which one of their number is interested. But a director who is a managing director is absolutely prohibited from entering into a contract in which he is personally interested and cannot rely upon such an article. If a director enters into a contract in which he is interested in breach of this rule he is liable to account for the profits.

Counsel for the appellant went on to make further submissions as follows. Beng Siew was a director of Kong Thai Lumber in which Kong Thai Sawmill had a substantial investment. Clearly in exercising his powers as a director of Kong Thai Lumber he was bound to do so for the benefit of Kong Thai Lumber and therefore indirectly for the benefit of K.T.S. which was a shareholder in Kong Thai Lumber. As director of Kong Thai Lumber, Beng Siew entered into a contract with Chalfont, a company in which he was interested as shareholder, and that contract was one which no person who had the interest of K.T.S. at heart would have entered into. Precisely the same thing happened with Sabah Agency and Glendale. Those two contracts were clearly improper contracts. It is clear that this detriment to Kong Thai and Sabah Agency became apparent to Beng Siew and his advisers, because he filed a corrective affidavit to say that the matter had been put right and the agreements had been amended. However, there is conflict between what he said in his corrective affidavit and what he said in evidence. The fact is that both the original and subsequent agreements are disadvantageous to Kong Thai and Sabah Agency and advantageous to Chalfont and Glendale, the reason being that in both agreements there is a fixed price which could not be altered without further agreements with the Hong Kong companies. Beng Siew put himself in a position where his duties and interest were in conflict, thus abusing his power. The consistent pattern was one in which the controlling directors consistently put themselves in positions in which they were dealing on behalf of K.T.S. and its associate companies with companies in which they were themselves interested without previous authority from the board of directors of K.T.S. This was another reason why the applicant as a minority shareholder was entitled to say that he had justifiably lost confidence in the probity of the managing director to act fairly in the interest of the company.

It was contended for the respondents that no authority was produced for the proposition that Beng Siew should not have entered into contracts on behalf of Kong Thai Lumber and Sabah Agency with Chalfont and Glendale in which he had an interest. The only other argument advanced was that Kong Thai Lumber and Sabah Agency were not subsidiaries of Kong Thai Sawmill.

I do not think any authority is required for the argument advanced by counsel for the applicant as regards the liability of Beng Siew to account for the profits. But there is a good deal of substance in the argument that he has no direct liability to account to K.T.S. for contracts which he entered into on behalf of the Sabah companies in which K.T.S. was a shareholder like any other shareholder. The liability to account for the profits in my view is to those Sabah companies with which we are not concerned in these proceedings. However, reprehensible Beng Siew's conduct may have been with regard to those contracts, I must hold that he is not liable to account to K.T.S. for the profits which he has made and will probably continue to make in those two Hong Kong companies.

5 *Malaysian Daily News Sendirian Berhad*

The acquisition of the *Malaysian Daily News* was obviously not in line with the company's business as a timber company. There is no evidence that the newspaper has proved to be a profitable venture, nor is there any indication that it will ever be. The applicant's complaint is that the newspaper was acquired as an organ to further the political ambitions of Beng Siew and Beng Siong. There would appear to be no doubt as to the interest which Beng Siew and Beng Siong took in the politics of Sarawak. There can also be no doubt that a newspaper is a very valuable instrument for a politician. But there would appear to be no evidence, apart from speculation, that the newspaper has been used to further the political

ambitions of either Beng Siew or Beng Siong. As I have already said, as a business venture the *Malaysian Daily News* has not proved to be profitable, but Beng Siew had been given a full authority by the board of directors to make such investments as he thought fit. In those circumstances I do not think it is open to this court to make any order with regard to this investment.

6. *Aurora Hotel*

The basis of the complaint about the Aurora Hotel was that it was purchased without a proper survey as to its profitability and without calling a meeting of the board of directors. But the board of directors had given Beng Siew full authority to make such investments. The shrewd businessman that Beng Siew is, I do not think he needed any advice or survey as to the advisibility of purchasing the Aurora Hotel. Here he was investing money in immovable property which in the nature of things continues to rise in price with inflation and rarely comes down even with deflation. There is some evidence that another immovable property was bought in Kuching and sold at a profit. Indeed, it will be correct to say that the Aurora Hotel building in itself is perhaps the most valuable asset which the company now owns. The hotel may not have made profits in the early stages of its acquisition, but I do not think that it will continue to suffer losses. I therefore agree with the learned judge's finding that there is no ground for complaint as regards the purchase of the Aurora Hotel.

7 *Berjaya Malaysia*

Beng Siew used $48,000 of the company's funds to buy Berjaya Malaysia but he had it registered in his own name as his private property. The explanation he gave for doing that was that there were stricter safety regulations if the yacht was registered in the name of a company than if it was registered in the name of an individual. The boat was renovated at a cost to K.T.S. of more than $500,000. The running expenses of the boat in the year 1968/69 were $189,027.80 and in the year 1969/70 they were $95,910.49. The total amount spent on Berjaya Malaysia up to the time of Peattie's inspection was $797,031.91. That is a very large sum of money and the applicant as a shareholder was entitled to know what the company got in return.

The records of K.T.S. contained no explanation about the expenditure and there was nothing in them to show that the boat was necessary or was used for the company's business. The vessel is not a working boat. It is an extremely luxurious yacht and has been used as such by Beng Siew and Beng Siong. According to Beng Siew the boat was used for travel to Indonesia, but there is no evidence that it ever went there. There was a half-hearted suggestion that the boat could be used for travelling to Niah, but Beng Siew eventually admitted that they used a different boat for that purpose. From this admission it is clear that Berjaya Malaysia was unnecessary for the company's business.

According to Beng Siew any director could have used the yacht if he wished to do so, but no director wanted to and so it was in fact used only by Beng Siew or Beng Siong. In any event, it is not right that the company should pay such large sums of money merely for the amusement of the directors. Beng Siew's statement that it was used in Singapore, Kuching and Penang etc. to entertain customers is beside the point. The company did not sell timber to those places and in fact had no customers there, since it sold through an agency. The suggestion that purchasers of timber required entertaining has no support in evidence. Moreover all these places are easily accessible by air far more quickly and far more conveniently than by boat, and all of them possess excellent facilities for entertainment if there was any need to entertain any one. For the company to have a boat costing more than half a million dollars merely for the purpose of entertaining customers is the height of absurdity, even if it could afford it. Needless to say, a luxury yacht can hardly be called an investment.

The motion sought an order that Beng Siew should take over and pay for the boat. In his affidavit Beng Siew said that he was only too willing to take over the yacht. He tried to convey the impression that a number of people were eager to buy the boat and that it was worth more than was spent on it. He produced a letter which carefully avoided making a definite offer or mentioning a definite price. This letter was written after the proceedings had commenced. He said that the only thing deterring him from taking over the boat was the fact that this would mean a personal gain to him and a substantial loss to K.T.S. He himself gave the lie to the sincerity of his statement that he was willing to buy when he stated under cross-examination that he was not willing to do so.

No prior authority was given by the board for the purchase of Berjaya Malaysia or for its reconstruction. But Beng Siew secured retrospective approval, as he secured retrospective approval for so many other things which needed to be put right from his two directors on June 10, 1970 when 24 resolutions were put through in 90 minutes.

On the subject of Berjaya Malaysia counsel for the applicant in the court below submitted as follows: —

"The evidence on Berjaya Malaysia as a whole shows conclusively that it was an extremely expensive vessel to buy and renovate, it is extremely luxurious, it is very expensive to run, that it is not the kind of boat which a logging company requires, that the contention that it was required to entertain people in Singapore, Penang etc., is preposterous, and that it was in fact used as a personal yacht principally by Beng Siew and also by Beng Siong, that K.T.S. money was used to provide and maintain this personal yacht for Beng Siew and Beng Siong, who spent not a cent of their own money on it but in this matter, as in so many others, used K.T.S. funds to provide for all their own lavish requirements."

It would be difficult for any court not to agree with that submission in the circumstances of the case.

The view which the learned judge took about Berjaya Malaysia is stated in his judgment as follows:

"Peattie under cross-examination said that he had received a full explanation for the moneys spent on the Yacht and was satisfied that the expenditure was in accordance with the authority of the Board of Directors (See K.T.S. 46 Folio 36), of which at the relevant time the applicant was a member though he did not choose to attend the meetings. He also conceded that the vessel appeared to be used in connec-

tion with investment companies. Peattie agreed that it was a decision properly within the domain and discretion of the Directors."

With respect to the learned judge, it did not matter what Peattie had to say about Berjaya Malaysia under cross-examination. The question which he had to decide was whether in the light of the evidence not only of Peattie but also of Beng Siew, it was right for K.T.S. to have been saddled with a white elephant at such an enormous expense. Beng Siew had general approval of the resolution of the board of directors of December 27, 1967 to purchase "tractors, logging trucks, machineries and other equipment necessary for the operation of the company." I find it quite impossible to agree that that authority covered the purchase of a luxury yacht. Whether or not the purchase and renovation of Berjaya Malaysia was approved *ex post facto*, it is open to this court to make an order under section 181 of the Companies Act, in fairness to the shareholders of the company, that the *ex post facto* resolution be cancelled and that Beng Siew be required to take over the boat and pay back to the company all the money that have been spent on its purchase, renovation and maintenance up to date. I would therefore make an order accordingly.

8. *Donations*

(i) Sarawak Chinese Association (S.C.A.)

The investigation by Peattie revealed that a sum of $2,018,674 was paid out from K.T.S. funds as donations during the period 1966/70. By way of comparison a sum of $2,298,400 was paid out as dividends to the shareholders during the same period.

The amount of donations made to the Sarawak Chinese Association (S.C.A.) in the year 1968/69 as shown in the company's books is $1,009,800.69. It is with these donations that we are concerned in the appeal, as they were the ones which were questioned by the applicant when he started making the enquiries which resulted in these proceedings. A large number of these donations were not made direct by K.T.S. but were made by Beng Siew personally in his own name and later reimbursed by K.T.S. He was the chairman or president of S.C.A., so that the donations were made by him in one capacity to himself in another capacity. In those circumstances, there was a heavy burden on him to show that the payments were actually made for the purposes of S.C.A., that they were properly authorised on behalf of K.T.S. and that they were made *bona fide* for the benefit of K.T.S. He failed to produce any evidence to substantiate any of these matters.

He was unable to remember exactly how the money had been spent. He claimed that the accounts of S.C.A. for the relevant period would show the payments and the way the money had been dealt with by S.C.A., but that the accounts had been burgled. The curious thing about the burglary was that it was not reported to the police until three weeks after it was alleged to have taken place and nothing else was stolen. In evaluating this evidence it is important to bear in mind that on two previous occasions when the applicant sought to obtain accounts from Beng Siew in relation to his administration of his father's estate and the management of the family partnerships, he had said in one case that the accounts had been destroyed in accordance with his father's usual business practice and in the other case that they had been lost in a flood. It is more than a coincidence that when asked to produce accounts of how the donations were utilised, he gives theft as an excuse for his failure to do so.

He claimed that the accounts had been audited, but he was unable to produce any copy from the auditors. At the adjourned hearing he admitted that during his period as president no accounts of S.C.A. had ever been audited. He also admitted that a large part of the donations which appear from the books of K.T.S. to have been made to S.C.A. were not made to S.C.A. but to other political parties. As regards the receipts in respect of the donations, he implied in his affidavit that they were issued when the payments were made. The receipts bear dates ranging from October 1, 1968 to September 29, 1969, although Beng Siew admitted that they were not issued until after the 1970 elections, that is, after the applicant had written a letter asking for details of donations. Later he said that the auditor asked for the receipts when he was auditing the accounts, but the audited accounts were approved on March 9 by which time the auditor had done his work. The only inference from all the evidence which Beng Siew gave about the receipts would appear to be that they were issued in order to show them to the applicant's investigator.

The accounts lodged with the Registrar of Societies by the S.C.A. did not reveal the donations said to have been made by K.T.S. to S.C.A. An attempt was made to explain this by saying that the accounts for the headquarters of S.C.A. did not include the branches. Thus the only evidence about the donations was that of Beng Siew himself whose memory about them by his own confession was faulty. No evidence was given by other officers of the association who might be expected to know about the receipt and expenditure of the donations.

The payments together with receipts shown in the accounts of S.C.A. with the Hock Hua Bank did not account for all the payments shown in the books of K.T.S. as donations to S.C.A. and in fact paid to Beng Siew in reimbursement. No authority was given by the board of directors of K.T.S. for the payments made to Beng Siew and charged as donations to S.C.A. until the passing of the resolution of June 10, 1970. The passing of the resolution shows conclusively that the purported donations were not authorised by the directors other than by Beng Siew or Beng Siong at the time they were made.

(ii) To Sarawak National Party (S.N.A.P.)

Peattie's affidavit disclosed that the books of accounts of K.T.S. showed donations to Sarawak National Party (S.N.A.P.) amounting to $145,000 during the year 1968/69. Datuk Stephen Kalong Ningkan filed an affidavit to say that these payments were never received by the treasurer of S.N.A.P. At his cross-examination in court, receipts purporting to be receipts by S.N.A.P. were produced and it was suggested that he had failed to make proper inquiries from the fund raising committee of S.N.A.P. How-

ever, the cross-examination of Beng Siew revealed that the payments were made not to S.N.A.P., but to candidates, in particular one Charles Ingka, to induce them to desert S.N.A.P., which had left the Alliance, and oppose it in the elections. At first Beng Siew denied that he knew that Charles Ingka had left S.N.A.P. when payments were made to him. Later he admitted that when he made the payments he had heard that Charles Ingka was no longer a member of S.N.A.P. It was thus clear that the payments were not made to S.N.A.P. but to persons opposed to S.N.A.P. Further, three of the payments were made by Beng Siew personally and later reimbursed from the funds of K.T.S. No authority of the board of directors was given for these reimbursements of private donations made by Beng Siew until the resolution of June 10, 1970.

It was submitted for the applicant in the court below that a large number of the donations were made by Beng Siew personally and subsequently reimbursed from K.T.S. funds without authority from the board of directors. It was also submitted that while a company has power to make donations for charitable and public purposes, such donations can only be justified if made *bona fide* for the benefit of the company by enhancing its public reputation. It was lastly submitted that the payments by Beng Siew enhanced and were made to enhance his own personal reputation.

Counsel for the respondents submitted that it was clear from Peattie's evidence and the documents which were referred to him in cross-examination that the company had power to make donations of this nature, that the donations were in fact authorised by the board and that so far as Peattie was concerned he had seen and was satisfied with the evidence of the receipt of the moneys by the recipients.

The learned judge agreed with the submissions made by counsel for the respondents and made the following findings of fact.

"Upon the evidence and as agreed or conceded by Peattie before the court I find as a fact:

(a) that donations were in fact made by Kong Thai (not by Beng Siew) in the amounts and to the recipients disclosed in the evidence from 1965 to 1970;

(b) that the company has power in its memorandum to make donations;

(c) that all the donations were reported at board meetings and approved by the directors and that the amounts were audited (see Ex. KTS 46 page 57);

(d) that the accounts containing reference to the donations were presented at the annual general meetings of the shareholders of the company and approved by the members without dissent;

(e) that the allegations made by Beng Sung in his affidavit (paragraph 77(c)) that the political donations were made for personal political advancement of Beng Siew have not been proved.

It is desirable to point out that the applicant did not become a shareholder until 1st January 1967."

It would seem clear that the learned judge relied on these findings of fact solely on the evidence of Peattie and completely overlooked the very unsatisfactory nature of Beng Siew's evidence in relation to the donations made to S.C.A. and S.N.A.P. in the year 1968/69. Beng Siew had no general authority delegated to him by the board of directors to make those donations on behalf of the company. His story that he was given such authority when the company was formed cannot possibly be true. If there had been any such authority it would have been in writing in a proper resolution like the authority which was delegated to him to purchase equipment necessary for the operation of the company and to make investments. The authority by the board was given *ex post facto* by one of their numerous resolutions passed on June 10, 1970 after the applicant had written to ask for particulars of donations. Beng Siew should have made no donation to himself as president of S.C.A. without the express approval of the board before the donations were actually made. He had no authority, and neither the board nor the company in general meeting could give him authority, to reimburse himself moneys which he had spent for political purposes.

In my judgment on the evidence as a whole a case has been made out for this court in the exercise of its jurisdiction under section 181 of the Companies Act to order Beng Siew to pay back to the company the total sum of $1,154,800.69 which was paid out allegedly as donations to S.C.A. and S.N.A.P. in the year 1968/69. I would make an order accordingly.

9. *Drawings by Beng Siew and Beng Siong*

Substantial drawings by Beng Siew, Ling Beng Siew & Co. and Beng Siong were revealed in the books of K.T.S. for the financial years 1966 to 1970, as stated by Peattie in his affidavit. On the sums owing from time to time no interest was paid nor was security given for repayment. Furthermore, there was no authority given for these drawings which were in most cases in contravention of the provisions of the Companies Act, being loans to directors of a public company.

Both the total amounts and the balances from time to time in respect of such drawings by Beng Siew and Beng Siong from K.T.S. funds were large. Furthermore, efforts were made to ensure that these balances did not appear in the accounts of K.T.S. by the expedience of temporary repayment of the amounts owing immediately before the end of the company's financial year and taking out substantial sums again shortly after the end of the company's financial year.

The evidence with regard to these drawings clearly shows that Beng Siew and Beng Siong took money from the company as and when they liked. They took it without authority. They took it because they controlled the funds. It is true that Beng Siew's account had large credit balances for a period in the year 1970. It is also true that Beng Siew had guaranteed a large loan from a bank to the company. Moreover, the matters were put right by one of the numerous resolutions passed on June 10, 1970 that interest be charged on the balance of the amounts outstanding. But all that do not alter the fact that it was wrong for Beng Siew and Beng Siong to take money from the company's funds in the way they did.

The learned judge dealt with this question by agreeing with the written submission of respondents' counsel. This is what he says in his judgment:

"In regard to drawings and other payments the evidence shows that interest has now been credited. I am satisfied that the failure to charge interest prior to the commencement of these proceedings was not deliberate and accordingly further consideration of items falling under this category is not now necessary."

With respect to the learned judge, the charges against Beng Siew and Beng Siong were very serious. I think it reasonable to assume that but for these proceedings nothing would have been done about these drawings. I do not therefore think that failure to charge interest was not deliberate or that it was due to inadvertence on the part of Beng Siew or Beng Siong. The truth is that these drawings were never shown in the annual accounts. They remained concealed from the other directors and from the shareholders because they were never discussed at any board meetings and were not shown in the annual accounts. The drawings by Beng Siong were inexcusable. His account was all the time in debit except when he made payment just before the end of the financial year. He filed no affidavit and gave no evidence to offer any explanation. How can it then be said in his case that the failure to charge interest was not deliberate?

The fact that the matters were put right after the applicant started making inquiries is no answer to the charge. With respect, what the learned judge failed to consider was that these drawings clearly showed lack of probity on the part of the controlling directors resulting in a justifiable lack of confidence in them as directors by any minority shareholder. The attitude of Beng Siew and Beng Siong clearly was that so long as they held control over the funds as directors they could do what they pleased. That obviously is not permitted when one is dealing with a public company.

In *Loft, Inc.* v. *Guth*,[4] Layton C.J. delivering the opinion of the court said at page 515:

"Guth's abstractions of Loft's money and materials are complacently referred to as borrowings. Whether his acts are to be deemed properly cognizable in a civil court at all, we need not inquire, but certain it is that borrowing is not descriptive of them. A borrower presumes a lender acting freely. Guth took without limit or stint from a helpless corporation, in violation of a statute enacted for the protection of corporations against such abuses, and without the knowledge or authority of the corporation's Board of Directors. Cunning and craft supplanted sincerity. Frankness gave way to concealment."

I am compelled to say that these words of the learned judge apply equally to Beng Siew and Beng Siong.

Having dealt with the matters complained of by the applicant, I now come to the grounds on which the application was resisted.

As I have stated at the beginning of my judgment, the first ground on which the application was opposed was that the proceedings were brought with an ulterior motive. In this connection the written submission made by learned counsel for the respondents in the court below reads as follows:

"The respondents to these proceedings invite the court to dismiss them summarily on the grounds that they are made with an ulterior motive namely that they form part of a long history of family disputes and represent an attempt by the applicant to vent his personal spite on his elder brother, the respondent. It is common ground between the parties that since the death of the father in 1955 there has been a long history of family disputes between the three older brothers on the one hand and the three younger brothers on the other. In his original affidavit, the applicant as one would have expected because it was not then an issue, made no reference to this history of family disputes. It was, however, dealt with in the affidavit of Beng Siew who was cross-examined with a view to establishing that he was the one to blame and in re-examination, he was asked to and did give in much fuller detail an account of the relevant facts relating to some parts of this dispute. It is, it is submitted, a material fact which the court is bound to take into account in considering this aspect of the matter that the applicant did not see fit either to file an affidavit in reply to the evidence given by Beng Siew or perhaps more significantly to put himself in the position of having to answer questions on matters which were raised in the cross-examination of Beng Siew. Counsel for the applicant expressly stated that he did not propose to read a supplementary affidavit on the grounds that he did not wish to subject him, the applicant, to further cross-examination. The court is, therefore, bound to conclude that any evidence which the applicant would have given by way of rebuttal would have been adverse to his own case and should, therefore, accept the only evidence being that of Beng Siew on the nature and history of the family dispute a part of which included the circumstances under which the shares of the three younger brothers in the company came to be held by them in the first instance. This evidence, taken in conjunction with the other matters adverted to elsewhere in these submissions as being relevant on the question of motive, lead to the conclusion, and the court is invited to so find, that the prime and only real purpose of these proceedings is the destruction both financially and in the way of his reputation, of Beng Siew and that the applicant is seeking an Order which will best give effect to this purpose irrespective of the financial damage which it might do not only to himself but also to the other minority shareholders, none of whom have come out in support of this application and some of whom by implication in the affairs of the company, as appears from the records of the company which are in evidence, must be taken to have approved the various courses of action which are now the subject of complaint by the applicant."

There is no dispute about the existence of ill-feeling that exists in the family. It is also equally clear that this ill-feeling began with the dispute which arose when the younger brothers asked for the accounts of the administration of their father's estate of which Beng Siew and Beng Siong were the administrators. The second dispute arose in relation to the accounts of the partnerships which were being carried on by Beng Siew and Beng Siong. It is the younger brothers who were aggrieved over the failure of Beng Siew and Beng Siong to produce accounts. The explanation given on those two occasions was that the accounts had been destroyed or were lost in a flood. The explanation given by Beng Siew when he was asked to produce the accounts of Sarawak Chinese Association as to how the donations were utilised was that the only copy of the accounts showing how they were spent had been stolen by somebody who had broken into the office, with nothing else stolen. But those disputes were settled long ago. How then does any question of motive by the applicant in making the present application arise?

I do not know what dispute there can be as to the circumstances in which the shares of the three younger brothers were issued to them. What Beng Siew said in his affidavit was that he gave the younger brothers shares in the company because Beng Sung begged him, and that the relationship between them soured when he was unable to get them a further 2,000 shares. If it was proposed to put all this to Beng Sung, why was he not cross-examined on the point when he gave evidence? How could the court therefore conclude

that any evidence which the applicant would have given by way of rebuttal would have been adverse to his own case. Even if the evidence of Beng Siew on the nature and history of the family dispute, a part of which included the circumstances under which the shares of the three younger brothers in the company came to be held by them in the first instance, were to be accepted fully, it does not show any malice on the part of the applicant.

The shares in the company were first allotted to Mukah Sawmills which belongs to the three younger brothers. A sum of $100,000 was paid in cash for the shares on December 25, 1965 when the company was still developing its timber concession and was short of cash. There is evidence that some equipment was bought with that money. The shares were not allotted until the following year. The company had borrowed money from the three younger brothers' bank. Assuming that Beng Siew had done the three younger brothers a favour by giving them shares in the company, is that any reason why the applicant should not have brought these proceedings to question the way in which the affairs of the company were being managed by Beng Siew? I do not think so. The fact that it required the directors to pass 24 resolutions on June 10, 1970 to put right matters which were wrong is sufficient to refute any argument that these proceedings were brought maliciously with some ulterior motive. Indeed in those circumstances motive was entirely irrelevant. In my judgment the whole argument about motive was another red herring which, with great respect to the learned judge, completely misled him into making a finding of fact that these proceedings were actuated by malice.

Perhaps it would be useful to quote the judge's views as to his finding of malice. This is what his Lordship says in his judgment:

"A fact which calls for mention is that the applicant accused the second respondent Beng Siew of having misappropriated funds of Kong Thai to make donations in his own name or for the furtherance of his own personal or political ambitions and those of the third respondent.

This considered in the light of Peattie's evidence is not true for Peattie in his cross-examination said 'as far as I know there is not a jot of evidence to suggest anything improper.' 'Agreed that donations were made and approved.' (Page 751 and 76A of Record.)

In paragraph 77 of his affidavit applicant again accused the second respondent of misappropriating and converting moneys to his own use without the knowledge or authority of the directors or shareholders.

This seems to be an expression of opinion which is upon the evidence unfounded and unsupported and I hold that this was motivated by malice.

Further allegations were made by applicant that Beng Siong with the authority and connivance of Beng Siew and without the knowledge or authority of the other directors or shareholders misappropriated and converted to his own private and personal use certain funds of the company.

...

In the present motion, there is no evidence to support any allegation of misappropriation by either the second or third respondent (see page 170 of Record).

The Prayers asked by the application sought relief as an oppressed minority shareholder upon the ground that the affairs of the company are being conducted or the powers are being exercised in a manner oppressive to him (section 181(1)(a)). They do not show any honest belief that he is being oppressed. In my view therefore there is abundant evidence on which the court could properly conclude that the allegations are actuated by malice and I so find.

From these statements, it seems to the court that the applicant's complaints appear to me to be so ill-founded as to be consistent with a firmly fixed and unalterable determination of the applicant to wreck the company without regard to whether such a course is justified."

With great respect to the learned judge, far from there being abundant evidence that the allegations were founded on malice, there was no evidence whatsoever for that conclusion. The learned judge says that there was no evidence to support the allegation of misappropriation by either the second or third respondent. With respect, there was ample evidence. The fact that the two respondents were helping themselves to the company's money as and when they liked, even though for short periods, was nothing short of misappropriation of the company's funds. The fact that the accounts they had with the company were current accounts does not alter the fact that moneys were drawn without any reference to the board and were very cleverly kept out of the annual accounts.

The second ground for opposing the application was that in so far as the acts complained of were specifically or generally authorised or approved by the directors, it is all the directors including the applicant who would be liable if the applicant was successful; yet the other directors have not been made parties to these proceedings. I do not think there is any merit in this ground.

A director is not liable for the acts of his co-directors of which he has no knowledge and in which he has taken no part, as his fellow directors are not his servants or agents to impose liability on him. Non-attendance at board meetings has been held not to impose liability on a director for the acts of the board. (See *re Denham & Co.*).[5] When a director has misapplied the company's funds by advancing money for a non-authorised purpose he is not entitled to obtain contribution from the other directors. Every director is entitled to have reasonable notice of a meeting. There is no evidence that the applicant had reasonable notice of any meeting.

The complaint against the respondents as regards drawings was that they were never specifically or generally authorised. They were ratified by the directors *ex post facto* after the applicant had started making inquiries. The same is true of the donations. The authorisation in respect of Berjaya Malaysia was given *ex post facto*. The vessel was bought in the name of Beng Siew and was not transferred to the company until 1970. The powers delegated to Beng Siew did not cover the purchase of a luxury yacht. There was no power delegated to him at any time in writing to make donations to political parties in his own name and at his discretion and to get himself reimbursed from the company's funds. The applicant himself never took part in the ratification of any of the acts. I do not think his being present at any of the board meetings would have made the slightest difference.

It is to be observed that the three serious transgressions by the respondents are alleged to be in relation to the purchase of Berjaya Malaysia, the political

donations, and the drawings made by them from the company's funds. It was argued before us that during the time that all these transgressions took place the applicant was a director of the company and as such responsible for the acts of the company. He took all the remuneration due to him as director but chose not to concern himself with the affairs of the company. He therefore acquiesced in what Beng Siew and Beng Siong had done. It was next argued that if he had performed his duties correctly he would have known what was going on.

The truth is that if the applicant had attended all the board meetings he would have learned about the purchase of Berjaya Malaysia but only after it had been purchased. He would not have learned anything about the donations because they were never disclosed at board meetings. He would have learned about them from the annual accounts but there were no big donations until the year 1968/69. It was when he saw the accounts for that year in 1970 that he immediately started inquiries, and in his letter of April 27, 1970 the first subject of inquiry was the donations. I do not think, therefore, that he acquiesced in those donations. He would not have learned of the drawings because they were never discussed at any board meetings and they were not shown in the annual accounts. It is true that he would have learned a lot if he had attended the meeting of June 10, 1970, but by then he had obviously made his choice and was making his own inquiries which ultimately brought about these proceedings. Moreover, it is extremely unlikely, that he was given notice of this meeting.

Quite apart from what is alleged against Beng Siew, it must be acknowledged that it was his business acumen and genius which made the company what it was. I do not think he could be accused of having made any bad investments except perhaps in the case of the *Malaysian Daily News*. He was largely responsible for building up what has been referred to as the K.T.S. empire. It would seem clear that he ran the whole show without referring any important matter to the board of directors. He controlled the majority of votes in general meetings. It will be true to say of him, as was said of Mr. McLaren by Lord Shaw of Dunfermline in *Loch* v. *John Blackwood Ltd.*,[6] that for reasons not unnatural he had come to be of opinion that the business owed much of its value and prosperity to himself. But he appears to have proceeded to the further stage of feeling that in these circumstances he could manage the business as if it were his own. This obviously he had no power to do. That is the gravamen of the complaints against him.

The third ground on which the application was opposed was that the complaints which are made do not affect the applicant in his capacity as a shareholder though, if established, they might affect him in his capacity as a director. If I understand this ground correctly, a short answer to it is to be found in *Re R.H. Harmer Ltd.*[1] in which it was held that once it was shown that the acts complained of were oppressive to the petitioners as members of the company, it was irrelevant that the petitioners also were directors, for oppressed members who were also directors were not, by virtue of holding such office, disqualified from obtaining relief.

The last ground on which the application was opposed was that the relief sought in the originating motion is outside the scope of section 181 of the Companies Act. In this connection it was said that the facts relied upon by the applicant, even if found to be true, do not constitute oppression within the meaning of section 181. It was next said that the complaints made, even if established, which may constitute breaches of the Act have their own remedies prescribed by the Act for which section 181 may not be used as a substitute. It is further said that section 181 is not a substitute for a minority shareholder's action.

In my judgment the evidence with regard to drawings by Beng Siew and Beng Siong by itself constituted oppression. I do not think it can possibly be said that these drawings were not in disregard of the interests of the applicant as shareholder or those of the other minority shareholders. The Act forbids them, they were not authorised by the board and they were clearly wrongful. Coupled with the drawings are the large sums of money paid out as donations to political parties in the year 1968/69 and the moneys spent for the purchase, reconstruction and maintenance of Berjaya Malaysia. To my mind, the purchase of Berjaya Malaysia and the payment out of more than one million dollars as donation, without the prior approval of the board, were in complete disregard of the interests of the shareholders.

It was argued that most of the claims made by the applicant constitute claims for damages for misfeasance or breach of trust against Beng Siew and Beng Siong and that those claims if valid are properly claims to be made by K.T.S. and not by a single shareholder. The basis for that argument is the rule in *Foss* v. *Harbottle*[7] that where the majority of the shareholders claim and are held to have ratified alleged incidents of misfeasance or breach of trust against directors and where no fraud is alleged in the application, it is the company which must take action because of the rule that in the absence of fraud it is the majority that governs the affairs of the company.

It is clear from the rule itself that it cannot be invoked where the act complained of constitutes a fraud on a minority of the shareholders and the company is prevented from taking action against the wrongdoers by the votes controlled by the latter. It was said in the court below and repeated before us that there were no allegations of fraud. That to my mind is not true. There were the clearest allegations of fraud by the applicant in his affidavit in relation to the donations made by Beng Siew in his name for which he had himself reimbursed from the company's funds without any authority from the board and in relation to the drawings from the company from time to time both by him and Beng Siong. What was and is alleged is that Beng Siew and Beng Siong have been guilty of conduct rendering them liable to account to K.T.S. and that as they are the majority shareholders and control K.T.S. they can ensure that no proceedings are taken by K.T.S. to make them account for the moneys which ought properly to be accounted for to K.T.S.

Quite apart from the question of fraud, the rule in *Foss* v. *Harbottle*, in my opinion, is no bar to an in-

dividual shareholder making an application to the court under section 181 of the Companies Act. Speaking of the corresponding section 210 in the English Act, *Palmer's* Company Law (21st Edition) says at page 512:

"The court has unfettered discretion to make any order which it considers to be appropriate, *e.g.*, for the appointment of additional or other directors; for the removal or the restriction of the powers of a director, for the distribution of dividend or the issue of new shares; or for the prohibition of any of these measures. It can also order or authorise the purchase of the shares of the minority by the majority, the company or others at a price to be fixed by the court. Moreover, since the court may order or authorise the purchase of the shares of any member, the majority might find itself bought out by the minority under the section, a risk which might considerably affect the attitude of a majority in its negotiations with the minority."

At page 513 it is stated that "despite the somewhat restricted wording of section 210, the requirements of the section should be interpreted in a liberal spirit in order to carry out the intention of Parliament, which designed this remedy in order to suppress an acknowledged mischief." In this connection reference is made to *Re H.R. Harmer Ltd.*[1] in which the Court of Appeal affirmed the order of Roxburgh J. that the company should contract for the services of the father, who had continued to regard the business of the company as his own, as consultant at a stated salary, that he should not interfere in the affairs of the company otherwise than in accordance with the valid decision of the board of directors, and that he should be appointed president of the company for life, but that this should not impose any duties or confer any rights or powers.

It was further argued that section 181 exists for the purpose of bringing to an end or remedying the matters complained of and not for the destruction of the company. In this connection we were referred to *In re Bellador Silk Ltd.*[8] That was a case in which the petitioner applied under section 210 of the English Act asking, among other things, for the suspension of a director from office. He did not ask for a winding up order, such order being wholly inappropriate to an application under that section. He admitted in cross-examination that his true object was not to obtain the relief which he ostensibly claimed in the petition, but to bring pressure on the other shareholders and directors to pay moneys to other companies in which he was interested. That being so, the judge had no alternative but to dismiss the petition as an abuse of the process of the court. In my judgment that case has no bearing on the case before us. It was contended that the applicant here was trying to do the same as the applicant *In re Bellador Silk Ltd.* I must say that I can find no evidence whatsoever in support of this contention. There is ample evidence that a large number of the applicant's complaints were well-founded. As I have previously said, there is no evidence of any malice on his part, and certainly there is no evidence to suggest that his whole object in bringing these proceedings was to bring about a destruction of the company.

As regards the contention that even if the complaints made by the applicant have been established there are other remedies prescribed by the Act, I do not think I need concern myself with any other remedies that may be found in the Act when section 181(2) of the Act itself would appear to me to provide the most appropriate remedy in all the circumstances of the case. In this connection I would refer to the case of *Re Coliseum Stand Car Service Ltd.*[9] in which Abdul Hamid J. held that the applicant there was entitled to a relief aimed at bringing an end to or remedying the matters complained of, and made an order for some of the shares of the first respondent, the majority shareholder, to be purchased by the applicant. In my judgment that case was rightly decided. It was cited to the learned judge in the court below, but his Lordship was of the opinion that it threw no light upon the questions which arise in the present case because it was not a reasoned judgment. I do not agree, because similar questions do arise here. All that the learned judge had to decide in that case was whether the application therein had been rightly brought under section 181 of the Companies Act. The same question arises here. For a shareholder to be able to invoke the provisions of this section in aid of his application, all that is required is that the conduct complained of should at least involve a visible departure from the standards of fair dealing and the violation of conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely. (See *Buckley* on Companies Act 13 edition page 423).

I do not think it necessary to consider any of the English and Australian authorities which were cited in the court below and to us on the interpretation of section 181 of the Act which, as I have stated earlier, is wider in scope than the provisions of the English and Australian Acts from which it is derived.

To sum up, it would seem clear from the authorities that there are two fundamental principles as regards the position of directors. First, they are trustees of the company's money and property in the sense that they must account for all the company's money and property over which they exercise control, and must refund to the company any of its money or property which they have improperly paid away. Secondly, they are trustees of the powers entrusted to them in the sense that they must exercise their powers honestly and in the interests of the company and the shareholders and not in their own interests, failing which they may render themselves liable for their mis-use of such powers. Bearing those principles in mind I am of the opinion that the purchase by Beng Siew of Berjaya Malaysia was mis-use of the company's funds and that the moneys which he paid out or for which he had himself reimbursed from the company's funds in respect of donations to S.C.A. and S.N.A.P. in the year 1968/69 were improperly paid away. He must therefore take over Berjaya Malaysia and pay to the company all the money spent on it and also pay the company the amount of the donations paid to those two political parties.

It is true that the applicant was a director during the relevant period. But he did not attend any of the directors' meetings and there is no evidence that he was ever given written notice of any board meetings at which the questions of Berjaya Malaysia and political donations were discussed. Indeed, there is no

evidence that any elaborate discussions ever took place about either of the two items. It is extremely unlikely that he was invited to the meeting of the board of directors on June 10, 1970 at which the donations were ratified. There is no evidence that a sufficiently full and frank disclosure was made to the shareholders at that meeting of the facts upon which they were asked to vote. There were only two other directors present at that meeting and all the indications are that the very large number of resolutions passed at that meeting were rushed through. As *Palmer's* Company Law (21st Edition) says at page 506, a minority can prevent the company from acting on a resolution obtained by a trick, and it would be a trick if the notice of the meeting did not give a sufficiently full and frank disclosure to the directors of the facts upon which they were asked to vote.

It was submitted in the court below that in view of the obvious hostility of the applicant towards the respondents an appropriate remedy would be for the purchase by the majority of the applicant's minority shareholding. The learned judge did not think fit to make such an order, so that it is not necessary for me to consider the point. In my judgment it would be wrong and unjust to order the minority shares of an aggrieved applicant to be sold without his consent. As *Buckley* on the Companies Acts (13th edition) says at page 423, apparently no order for the purchase of shares by other members or by the company has ever been made under section 210 by the High Court in England otherwise than by consent.

In view of the orders which I have already indicated for the purpose of remedying the matters complained of, I do not think it would be right to make a winding-up order. As has been said again and again, such an order would not be made lightly, especially where alternative and more suitable remedies are available. Putting a liquidator in charge of the company with a view to its being eventually wound up will not, in my opinion, be beneficial to all the parties concerned.

In many cases it is not in the interests of the oppressed minority to have the company wound up. Liquidation of the company may result in the sale of its asset at break-up value, without regard to the value of the goodwill or "know-how" of the company, and the minority shareholder who, urged by the majority shareholders' oppression, petitions for a winding up order might, in effect, play his opponents' game (See *Palmer's* Company Law, 13th edition, page 511). It will be a colossal task for any liquidator to take charge of the company's affairs in view of the large investments it has in other companies. What is necessary is to make some orders to regulate the conduct of the affairs of the company in future.

Counsel for the appellant submitted that apart from any orders which this court might make to put right the past abuses by the respondents, the rights of the three younger brothers should be protected in future by attaching to their combined 1,000 shares the right to appoint one of them as a watch dog director on the board. I entirely agree with that submission. I do not, however, agree with the further submission for the revocation of Beng Siew's appointment as managing director and for the appointment of a manager under the supervision of the board, as I am of the considered opinion that the company can best be managed by Beng Siew himself with this restriction that no bank account of the company shall in future be operated without the signatures of two directors one of whom shall be a person other than Beng Siew, Beng Siong or Beng Tuang. I also think it necessary in all the circumstances of the case to make the orders that no moneys be withdrawn from the company by the managing director or any of the other directors without the prior approval of the board as in the past, that a three clear days' notice be given in writing of any directors' meetings, that bonus for the directors in future shall be 2% of the net profits of which 1% shall be for the managing director and 1% for the other directors, that no payment be made to any director in respect of bonus until after the passing of the accounts at the annual general meeting, that the power delegated to Beng Siew to make investments be cancelled and that no donations be made without the prior approval of the board of directors.

In the result I would allow this appeal, set aside the learned judge's order dismissing the motion and make the following orders:

(a) That Beng Siew do pay back to the company within six months all such sums as were paid out of the company's funds for the purchase, reconstruction and maintenance up to date of Berjaya Malaysia with interest at 6% per annum on the cost of purchase and reconstruction only as from September 1, 1971 to the date of payment, and that upon such payment the company do transfer the boat to Beng Siew.

(b) That Beng Siew do pay back to the company within six months the sum of $1,154,800.69 cts paid out from the company's funds as donations to the Sarawak Chinese Association and Sarawak National Party in the year 1968/69 with interest thereon at 6% per annum from September 1, 1971 to date of payment.

(c) That one of the three younger brothers be appointed as a 'watchdog' director to safeguard their interests, in rotation for each financial year of the company beginning with the appointment of Datuk Ling Beng Sung and followed by Ling Beng Hui and Ling Beng King.

(d) That no donations be made in future except in the name of the company and with the prior approval of the board of directors.

(e) That no bank account of the company be operated without the signatures of two directors one of whom shall be a person other than Datuk Ling Beng Siew, Datuk Ling Beng Siong or Ling Beng Tuang.

(f) That no moneys be withdrawn from the company by the managing director or any of the other directors as in the past without the prior approval of the board.

(g) That a three clear days' notice be given in writing of any directors' meetings.

(h) That the power delegated to Beng Siew to make investments on behalf of the company be cancelled.

(i) That bonus in future shall be 2% of the net profits of which 1% shall be for the managing director and 1% for the other directors.

(j) That no bonus be paid until after the passing of the company's accounts at the Annual General Meeting.

Having now heard arguments on the question of costs, I would order that the second and third respondents do pay the appellant's costs both here and in the court below. They must also pay the separate costs of the first respondent company, if any, both here and in the court below. There will be a certificate for two counsel.

Wan Suleiman F.J. and **Tan Chiaw Thong J.** concurred.

Appeal allowed.

Solicitors: *Tang & Co.; Yong & Wong.*

SUBRAMANIAM & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (Ajaib Singh J.) April 9, 1975]
[Seremban — Criminal Appeal No. 21 of 1974]

Criminal Law and Procedure — Summary trial — Plea of guilty — Charges not read and explained to accused persons separately — Sentence of whipping — Penal Code, ss. 34, 392 and 397 — Criminal Procedure Code (F.M.S. Cap. 6), ss. 305 and 422.

Penal Code, ss. 34, 392 and 397 — Robbery — Sentence of whipping.

The appellants were charged on two counts under sections 392 and 397 read with section 34 of the Penal Code. At the trial the charges were not read and explained to the appellants separately. The appellants pleaded guilty and were sentenced to four years' imprisonment and whipping. The appellants appealed.

Held: as the charges were not read and explained to the appellants separately the convictions and sentences must be set aside.

Cases referred to:-

(1) *Chua Ah Gan* v. *Public Prosecutor* [1958] M.L.J. liv.

(2) *Fong Siew Poh & Ors.* v. *Public Prosecutor* (1933) 1 M.C. 155.

(3) *R.* v. *Boyle* [1954] 2 All E.R. 721.

CRIMINAL APPEAL.

Datuk Balwant Singh for the first appellant.

K. Gunaretnam for the second appellant.

Abu Hashim bin Haji Abu Bakar (Deputy Public Prosecutor) for the respondent.

Ajaib Singh J.: This was an appeal against sentence. The appellants were charged on two counts under sections 392 and 397 read with section 34 of the Penal Code and upon their pleading guilty to the charges they were each sentenced to four years' imprisonment. In addition the first appellant was ordered to receive two strokes of the rotan and the second appellant was ordered to receive one stroke of the rotan.

The facts of this case as recorded by the learned President of the Sessions Court were that on August 26, 1974 at about 2 a.m. the two appellants together with a third person went to Labu Estate. One of them proceeded to the house of the complainant who was a hospital assistant of the estate dispensary. This person called out the complainant and told him that he had brought an injured man to the dispensary and requested the complainant to give him medical treatment. The complainant dressed up and accompanied the person to the dispensary which was a short distance away from the complainant's house. There the complainant saw two persons seated on a bench near the dispensary. The complainant then opened the dispensary and switched on the lights whereupon the three persons followed him in. Suddenly one of the three confronted the complainant and pointed a knife at his stomach and told him that it was their intention to rob him. The complainant tried to raise an alarm but one of the three pushed a towel into his mouth and removed a gold ring which the complainant was wearing. One of the three persons then left the dispensary and went to the complainant's house. There he told the complainant's wife that her husband wanted her to go to the dispensary. She accompanied this man to the dispensary and she too was confronted by the same person who was armed with a knife. This person then removed a gold ring and a gold chain from her. Both the complainant and his wife were then detained at the dispensary while one of the three persons went back to the complainant's house and ransacked a cupboard in the bedroom from where he took away one Rolex watch, one Longines watch and a lady's Hitex watch. While this was going on a conductor of the estate who was living nearby happened to see that the dispensary lights were on and becoming suspicious he walked up to the dispensary. On seeing him the three persons ran away and were seen driving off in a car. Shortly after that at about 3.10 a.m. the complainant lodged a report at Labu police station. The first appellant was arrested in the afternoon of the same day and the police recovered the three watches from him. Later at about 10.30 p.m. the second appellant was arrested and he led the police to a house in Pajam Estate from where the two gold rings and the gold chain were recovered. A third person alleged to be involved in this case was arrested two days later.

The appellants were produced before the learned President of the Sessions Court on April 30, 1974. They appeared in person and were not represented by counsel. A brief note purporting to show that the appellants were charged and that they were called upon to plead thereto appears in the appeal record as follows:—

"Charge Read Explained — Plead Guilty — Understand Nature and Consequences of Plea."

Following this note the learned president proceeded to record the facts of the case as outlined by the prosecuting officer which I have set out briefly at the outset of this judgment. Thereafter, the learned president after recording "Facts admitted by both the